

Universities' Exempt Status: Political Threat

09.03.20 | Linda J. Rosenthal, JD



It was September 8, 1971.

In the Oval Office, Richard M. Nixon chatted with his chief domestic-policy adviser, John Ehrlichman, about the upcoming 1972 election still fourteen months away. Mentioning potential Democratic rivals by name, the President asked: “Are we going after their tax returns? I ... you know what I mean? There’s a lot of gold in them thar hills.”

We know about this incident and Nixon’s express directive to weaponize the Internal Revenue Service because – (to paraphrase a more recent government official) – “Lordy,” there were “tapes.” These secret recordings were among the evidence used to support the 1974 Bill of Impeachment including Article II: “He has, acting personally and through his subordinates and agents, endeavoured to... cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner.”

Fast forward almost fifty years.

Now there are presidential tweets: out in the open, an undeniably direct line from the Oval Office to the Treasury Department and the Internal Revenue Service: “Too many Universities and School Systems are about Radical Left Indoctrination, not Education. Therefore, I am telling the Treasury Department to re-examine their Tax-Exempt Status ... and/or Funding, which will be taken away if this Propaganda or Act Against Public Policy continues. Our children must be Educated, not Indoctrinated!”

Tweets come and go, of course, but this one from the morning of July 10, 2020, did not quickly evaporate into the fog of the 24/7 news cycle. There have been concerning developments. Despite reassurances from leading experts that there are legal barriers to any real tax-exemption jeopardy from the Administration, the nation’s colleges and universities – and, indeed, the nonprofit

community generally – have felt a distinct chill in the air well in advance of the official date when summer turns to autumn.

Universities Push Back

The Tweet in Question surfaced against a backdrop of rising tensions between higher education and the Administration including presidential rhetoric on Independence Day at Mt. Rushmore and other recent comments complaining “about schools being driven by what he describes as a radical left-wing ideology” and “‘far left-fascism’ controlling American schools, newsrooms and other institutions.”

On July 6, 2020, the Administration (through the U.S. Immigration & Customs Enforcement) announced an abrupt change in policy on the status of international student-visa holders. Despite assurances the government offered earlier in the COVID-19 pandemic, there was to be a new rule that these students would have to attend at least one in-person class in the upcoming semester in order to stay in the United States. (Many colleges and universities had announced plans to hold online-only courses in the fall.)

“Trump’s tweets set off a firestorm of reactions focusing on the implicit political threat against free speech.” The higher-education community pushed back immediately including well-publicized tweets from individual professors vowing to hold at least one in-person class in the coming semester even if it meant everyone would be sitting outside in the snow. And by July 14th, a group of 20 colleges and universities in the Western U.S. filed a lawsuit over this rule change. (That same day, “... what Trump had dubbed “Propaganda” resulted in his administration changing its policy.”)

In the July 10th Tweet, the president did not name specific institutions whose tax-exempt status he wants the Treasury Department to review. And notwithstanding that the Administration later officially withdrew the immigration-rule change, the threat remained to review tax-exemptions and also withdraw federal funds.

Among those asking for specifics – and perhaps reassurances that this matter would not be pursued any further – was Rep. Richard Neal (D-MA), chair of the House Ways and Means Committee. On July 15th, he sent letters to the Internal Revenue Service and to the Treasury inspectors general.

In their formal written responses at the end of July, these officials, in appropriate bureaucratese, hemmed and hawed about what had happened or what may happen. For instance, the Deputy General Counsel replied that “the Secretary of the Treasury expects that Treasury’s Office of Tax Policy will conduct a policy review of the generally applicable regulations and guidance implicated by the President’s comment.” And, on July 31st, Treasury Secretary Steven Mnuchin announced there would be some kind of “review” coming, and that the issue of federal funding had been forwarded to the Department of Education for consideration.

Representative Neal wrote back to Treasury making clear he is not pleased with this state of affairs.

Legal Obstacles and Defenses

In [Trump tweets, tax law and alleged university 'propaganda'](#) (7/19/20) Professors Ellen P. Aprill and Samuel D. Brunson, provide an important and detailed legal analysis of the issues arising from, and defenses to, this threat to meddle.

A few weeks later, on August 2, 2020, Professor Brunson posted additional thoughts, summarizing the key points made earlier; see [IRS Investigation of Universities' Tax-Exempt Status](#), *Nonprofit Blogger*. The "...Treasury and the IRS face three significant problems in investigating universities."

First, "...even if you assume that universities are politically biased—and even if you assume they teach that bias to students—that doesn't mean they can't be exempt. Tax-exempt educational institutions can endorse particular viewpoints."

Second, Internal Revenue Code [section 7217](#), "... prohibits the President from requesting that the IRS audit a particular taxpayer." (No "particular taxpayer" was mentioned in The Tweet; nevertheless, they explain how this statute generally applies; Rep. Neal also mentions this statute in his letters to the IRS and Treasury.)

Third, "... the [Consolidated Appropriations Act, 2020](#) ... prohibits the IRS from targeting groups for regulatory scrutiny on the basis of their ideological beliefs."

Professors Aprill and Brunson include additional arguments as well in support of their analyses.

[Update 9/17/20]: This article has just been published on SSRN (with additional detail) under the title: [The University, Ideology, and Tax Exemption](#).

Conclusion

"Congressional restrictions—in addition to other legal issues—could make Trump's directive illegal and in violation of the First Amendment, tax and non-profit groups say." For instance, Mark Mazur, director of the Tax Policy Center and former assistant secretary of tax policy within the Treasury Department under then-President Barack Obama, agrees: "The tax code's clear that educational institutions generally qualify for tax-exempt status," adding "It's not, 'except the ones I don't like.'"

In [What a Direct Attack on Free Speech Looks Like](#) (July 10, 2020), *The Atlantic*, David Graham emphasizes the danger that should make us all shiver. In The Tweet (which he notes had that first day accumulated over 80,000 likes and 30,000 retweets), the President "... is making a bona fide threat against First Amendment speech itself, trying to use the power of the government to punish people whose expression he finds objectionable."

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